

Planning Agreement
regarding the
Bay-Delta Conservation Plan

July 11, 2006
DRAFT

DRAFT

July 11, 2006

TABLE OF CONTENTS

DRAFT

July 11, 2006

BAY DELTA CONSERVATION PLAN Planning Agreement

This agreement ("Planning Agreement") regarding the planning and preparation of the Bay Delta Conservation Plan ("BDCP") is entered into as of the Effective Date by and among the California Department of Water Resources ("DWR"), U.S. Bureau of Reclamation ("Reclamation"), the California Department of Fish and Game ("DFG"), the United States Fish and Wildlife Service ("USFWS"), the National Marine Fisheries Service ("NMFS"), the Metropolitan Water District of Southern California ("MWD"), the Kern County Water Agency ("KCWA"), the Santa Clara Valley Water District ("SCVWD"), Alameda County Flood Control and Water Conservation District, Zone 7 (Zone 7), the San Luis and Delta Mendota Water Authority ("SLDMWA"), the Westlands Water District ("WWD"), and Mirant Delta. These entities are referred to collectively as "Parties" and each individually as a "Party." The DFG, USFWS, and the NMFS are referred to collectively as "Fishery Agencies." MWD, KCWA, SCVWD, Zone 7, SLDMWA and WWD are referred to collectively as the "Water Contractors."

1. Definitions

The following terms as used in this Planning Agreement will have the meanings set forth below.

- 1.1.** "CEQA" means the California Environmental Quality Act, Public Resources Code, section 21000, *et seq.*
- 1.2.** "CESA" means the California Endangered Species Act, California Fish and Game Code, section 2050, *et seq.*
- 1.3.** "Covered Activities" means those certain activities that will be addressed in the BDCP and for which the Potential Regulated Entities and Other Parties may seek incidental take authorization pursuant to the California Fish and Game Code (section 2080.1, section 2081, and/or section 2835) and the federal Endangered Species Act ("FESA").
- 1.4.** "Covered Species" means those certain species that may be identified in the BDCP, both listed and non-listed, whose conservation and management are provided for in the BDCP, and which may be authorized for take under State and/or federal law once the BDCP is approved.
- 1.5.** "FESA" means the federal Endangered Species Act, 16 United States Code section 1530, *et seq.*
- 1.6.** "Habitat Conservation Plan" or "HCP" means a conservation plan prepared pursuant to section 10(a)(1)(B) of FESA.

DRAFT

July 11, 2006

- 1.7.** “Implementing Agreement” or “IA” means an agreement that defines the terms for implementing the BDCP.
- 1.8.** “Listed Species” means those species designated as candidate, threatened or endangered pursuant to CESA and/or listed as threatened or endangered under FESA.
- 1.9.** “Natural Community Conservation Plan” or “NCCP” means a conservation plan created pursuant to Fish and Game Code, section 2801, *et seq.*
- 1.10.** “Natural Community Conservation Planning Act” or “NCCPA” means Fish and Game Code, section 2801, *et seq.*
- 1.11.** “NEPA” means the National Environmental Policy Act, United States Code section 4321, *et seq.*
- 1.12.** “BDCP” means the Bay Delta Conservation Plan, a conservation plan prepared in furtherance of FESA, CESA and/or the NCCPA.
- 1.13.** “Planning Area” means the geographic area proposed to be addressed in the BDCP as described in section 5.1 and Exhibit [REDACTED].
- 1.14.** “Planning Subareas” means those geographic areas that are smaller units of the planning area that will each have a specific function or jurisdictional boundary within the permitted BDCP, as described in Section 5.1.
- 1.15.** “Potential Regulated Entities” means certain federal and non-federal entities, including Reclamation, DWR, the Water Contractors, and Other Delta Water Users, that export, divert or otherwise benefit from diversion of water from the Delta and/or its tributaries within the Planning Area, and whose activities may require incidental take authorizations pursuant to the California Fish and Game Code (section 2080.1, section 2081, and/or section 2835) and/or FESA.
- 1.16.** “Water Contractors” means, as of [effective date], MWD, KCWA, SCVWD, Zone 7, SLDMWA and WWD.
- 1.17.** “Other Delta Water Users” means, as of [effective date], Mirant Delta.
- 1.18.** “Other Parties” [DISCUSS DEFINITION]
- 1.19.** “Federal Action Agency” means a federal agency that authorizes, funds, or carries out actions that may require consultation with USFWS and/or NMFS pursuant to FESA section 7(a)(2).

DRAFT

July 11, 2006

1.20. “Biological Assessment” or “BA” means the information prepared by or under the direction of a Federal Action Agency for the purpose of identifying the potential effects of the agency action on species which are listed or proposed to be listed and critical habitat which has been designated or proposed within the Planning Area, and submitted to the U.S. Fish and Wildlife Service and/or National Marine Fisheries Service pursuant to section 7(c)(1) of FESA.

1.21. “Legal Delta” means the Sacramento-San Joaquin Delta as defined by section 12220 of the California Water Code.

2. Purposes of this Agreement

The purposes of this Planning Agreement are to:

- Define the Parties’ goals and commitments with regard to development of the BDCP;
- Define the initial geographic scope of the Planning Area;
- Identify a preliminary list of natural communities and species known or reasonably expected to be found in those communities, that are intended to be the initial focus of the BDCP;
- Identify preliminary conservation objectives for the Planning Area;
- Establish a process for the inclusion of independent scientific input into the planning process;
- Ensure coordination among the Fishery Agencies, particularly with respect to FESA;
- Establish a process to review interim projects within the Planning Area that will help achieve the preliminary conservation objectives and maintain viable conservation opportunities and alternatives for the BDCP; and
- Ensure public participation and outreach throughout the planning process.

The Parties have not yet determined whether it would be feasible or practicable to implement the BDCP, if it is developed, to meet the requirements of the NCCPA. However, to preserve the opportunity to develop the BDCP to meet NCCPA requirements and obtain DFG’s approval of the BDCP pursuant to the NCCPA, the Parties intend that this Planning Agreement will fulfill NCCPA requirements pertaining to planning agreements and will establish a mutually agreeable process for preparing the BDCP that meets the requirements of the NCCPA, CESA and FESA.

3. Planning Goals

The planning goals for the BDCP include the following:

- Provide for the conservation and management of Covered Species within the Planning Area;

DRAFT

July 11, 2006

- Preserve, restore and enhance aquatic and terrestrial natural communities and ecosystems that support Covered Species within the Planning Area through conservation partnerships;
- Allow for appropriate water supply, water quality, ecosystem, and levee projects to proceed within a stable regulatory framework;
- Provide a basis for permits necessary to lawfully take Covered Species;
- Provide a comprehensive means to coordinate and standardize mitigation and compensation requirements for Covered Activities within the Planning Area under CEQA, NEPA and applicable State and federal fish and wildlife protection laws, including FESA and CESA;
- Provide a less costly, more efficient project review process which results in greater conservation values than project-by-project, species-by-species review; and
- Provide clear expectations and regulatory assurances regarding Covered Activities occurring within the Planning Area.

A goal of the BDCP is to provide for the conservation of Covered Species, which means that the plan will ensure the implementation of actions that will contribute to the recovery of Covered Species, taking into consideration the scope of the BDCP Planning Area in relation to the geographic range of the Covered Species, and the effect of Covered Activities on these species in relation to other activities not addressed by the BDCP. The Parties acknowledge that this planning goal is intended to reflect the inherent constraints and potential limitations of the BDCP to ensure the recovery of Covered Species

The Parties further recognize that, until conservation strategies are developed for the Covered Species and their habitats, and conservation partnerships formed, the cost and feasibility of achieving these goals will not be known. The Parties may elect to modify the goals, as well as the BDCP's preliminary conservation objectives, Covered Species, Covered Activities, and Planning Area to ensure that implementation of the BDCP will be practicable. The Parties recognize that, regardless of any such modifications, the BDCP must meet applicable State and federal regulatory requirements to support the issuance of permits or authorizations for Covered Activities.

4. Compliance with Federal and State Fish and Wildlife Protection Laws

The Planning Area contains valuable biological resources, including native species of fish and wildlife and their habitats. Among the species within the Planning Area are certain species that are protected, or may be protected in the future, under CESA and/or FESA. The Parties intend for the BDCP to meet the requirements of federal and State fish and wildlife protection laws that apply to Covered Activities and to provide the basis for federal and State

DRAFT

July 11, 2006

authorizations for the take of Covered Species that may be caused by Covered Activities.

Under State law, take of species listed pursuant to CESA may be authorized under Fish and Game Code section 2080.1, section 2081, (both provisions of CESA) or section 2835 (a provision of the NCCPA). The NCCPA provides that after the approval of an NCCP, DFG may permit the taking of any identified species, listed or non-listed, whose conservation and management is provided for in the NCCP. Take of listed species may also be authorized pursuant to CESA. Non-listed species may be included as covered species in a conservation plan prepared pursuant to CESA, but a CESA take authorization would become effective with regard to non-listed species only if and when such species were listed.

The Parties intend for the BDCP to be sufficient to support the issuance of take authorizations for Covered Activities under CESA or the NCCPA. Alternatively, the BDCP may be developed to support the issuance of take authorizations under both CESA and the NCCPA, in which case take authorizations may be provided under CESA for some Covered Activities (e.g., for activities that may take only terrestrial species) and under the NCCPA for others (e.g., activities that may take aquatic species).

The Parties also intend for the BDCP to serve as a Habitat Conservation Plan that meets the requirements of section 10(a)(2)(A) of FESA, and to serve as a Biological Assessment that provides the basis for consultations between Reclamation and the USFWS and/or NMFS under section 7(a)(2) of FESA, to support the issuance of take authorizations for Covered Activities. [Note: Potential side agreement with USACE regarding this goal]

FESA provides that after the approval of an HCP, USFWS and/or NMFS may permit the taking of fish and wildlife species covered in the HCP if the HCP and permit application meet the requirements of section 10(a)(2)(A) and (B) of FESA. Take authorization for FESA-listed fish and wildlife species covered in the HCP are generally effective upon approval of the HCP and issuance of an incidental take permit. Take authorization for any non-listed species covered in the HCP becomes effective if and when the species is listed pursuant to FESA.

For actions authorized, funded or carried out by a Federal Action Agency, take of listed species may be authorized under section 7 of FESA based on a biological opinion prepared by the USFWS and/or NMFS. Take of non-listed species cannot be authorized under section 7 of FESA.

[Note: Suggest potential side agreements with the State and Regional Water Boards and EPA regarding the sufficiency of the BDCP to address species issues that may be related to their specific regulatory obligations]

DRAFT

July 11, 2006

4.1. Potential Regulated Entities' Obligation to Implement the BDCP

The Potential Regulated Entities recognize that they will be obligated to implement and/or fund implementation of measures in the BDCP that are required to minimize and mitigate the impacts of Covered Activities on Covered Species within the Planning Area in accordance with applicable federal and State fish and wildlife protection laws. However, the Parties may elect to include in the BDCP additional measures that exceed what is necessary to appropriately minimize or mitigate the impacts of Covered Activities. For example, if the BDCP is developed to meet the requirements of the NCCPA, the BDCP may include measures that are necessary to provide for the conservation and management of Covered Species, but are not necessary to minimize and mitigate the impacts of Covered Activities. The Parties acknowledge that the Potential Regulated Entities' execution of this Planning Agreement and participation in the BDCP planning process does not reflect an intention or agreement on the part of the Potential Regulated Entities to assume the obligation to implement conservation measures that exceed minimization and mitigation requirements. Rather, the Parties expect that the obligation to fund and/or to implement any such conservation measures would be shared by the Parties and that the Potentially Regulated Entities' share would be roughly proportional to the impact of their Covered Activities on Covered Species and their habitats. The shared obligation would be defined by mutual agreement and set forth in the Implementing Agreement. Potentially Regulated Entities would not be obligated to assume any other Party's share of the responsibility to fund and/or implement conservation measures for the Covered Species and their habitats.

4.2. Future FESA Section 7 Consultations

To the extent allowed under law, the Parties intend that the mitigation and minimization measures included in the BDCP, once approved by the USFWS and NMFS and included as a condition of federal incidental take authorizations to any Potential Regulated Entity, will serve as the range of measures to be incorporated into biological opinions associated with future section 7 consultations between the USFWS and/or NMFS and a Federal Action Agency regarding Covered Activities that may adversely affect listed Covered Species.

4.3. Concurrent Planning for Wetlands and Waters of the United States

The Potential Regulated Entities intend to address impacts to wetlands and waters of the United States and changes to the bed, bank or channel of rivers, streams and lakes resulting from Covered Activities in the Planning Area. Based on the BDCP, the Potential Regulated Entities may seek future programmatic permits or other forms of authorization under the Clean Water Act, section 1600 *et seq.* of the Fish and Game Code, and the Rivers and Harbors Act, as necessary for Covered Activities. The Parties agree to work together to explore the feasibility of undertaking concurrent but separate

DRAFT

July 11, 2006

planning regarding these permits. However, such programmatic permits or other forms of authorization are not necessary for approval of the BDCP or for issuances of take permits.

4.4. CEQA

The California Environmental Quality Act (CEQA) and its guidelines establish a comprehensive framework for environmental review of development projects, land use plans, and other actions approved or undertaken by California public agencies. CEQA sets forth both procedural and substantive requirements. CEQA procedures are intended to ensure adequate public participation and input into the decision-making process. CEQA's substantive requirements impose obligations on public agencies to identify both the significant effects of proposed projects and the feasible alternatives or feasible mitigation measures which would avoid or substantially lessen such significant effects. In the event that project alternatives or mitigation measures are not feasible, projects may be approved in spite of their significant effects. [INCLUDE LEAD AND RESPONSIBLE AGENCIES?]

4.5. NEPA

The National Environmental Policy Act (NEPA) was enacted by Congress in 1969 to ensure that federal agencies consider the environmental impacts of their actions and decisions. NEPA requires the federal government to identify all practicable means and measures to protect environmental values and makes consideration of environmental protection a part of the mandate of every federal agency and department. NEPA requires analysis and a detailed statement of the environmental impact of any proposed federal action which significantly affects the quality of the human environment. With respect to this HCP, the [LEAD AGENCY] will analyze the potential impacts related to the issuance of section 10 permits consistent with NEPA requirements.

4.6. Regulatory Assurances Under FESA

Upon approval of the BDCP and issuance of incidental take permits for Covered Activities, USFWS and NMFS will provide assurances to the [Define Entities] that neither the USFWS nor NMFS will require the commitment of additional land, water, or financial compensation or additional restrictions on the use of land, water, or other natural resources beyond the level otherwise agreed upon for Covered Species, without the consent of [Define Entities], in accordance with 50 C.F.R. section 17.22(b)(5), section 17.32(b)(5), and section 222.307(g).

4.7. Regulatory Assurances Under the NCCPA

If the BDCP meets the criteria for issuance of NCCP permits under section 2835 of the Fish and Game Code, DFG will approve the BDCP and provide assurances consistent with its statutory authority upon issuance of NCCP permits. Under section 2820(f) of the Fish and Game Code, DFG will provide assurances for the [Who?] commensurate with the level of long-term

DRAFT

July 11, 2006

conservation and associated implementation measures provided in the BDCP, including the assurance that, if unforeseen circumstances arise during implementation of the BDCP, DFG will not require additional land, water, or financial compensation or additional restrictions on the use of land, water, or other natural resources without the consent of the [Who?], as long as the BDCP is being implemented consistent with the terms of the Implementation Agreement.

4.8. Regulatory Assurances Under CESA

If the BDCP meets the criteria for issuance of CESA permits under section 2081 of the Fish and Game Code, DFG will approve the BDCP and provide assurances that, except as otherwise required by law, no further mitigation from the [Who?] consisting of land, additional land restrictions or financial compensation beyond that provided for in the BDCP will be required by DFG to address the impacts of Covered Activities on Covered Species or their habitats pursuant to CESA, as long as the BDCP is being implemented consistent with the terms of the Implementing Agreement.

5. Planning Area and BDCP Participants

5.1. Geographic Scope

The Planning Area to be addressed in the BDCP comprises the Delta and that portion of the Sacramento River downstream of Shasta Dam and adjacent riparian or upland ecosystems and natural communities, as depicted in Exhibit _____. [NOTE: ADD FEATHER RIVER AND/OR AMERICAN RIVER? SUISUN MARSH? STANISLAUS RIVER? SAN JOAQUIN RIVER BETWEEN THE STANISLAUS RIVER AND THE DELTA?]

5.1.1. Planning Subarea [if any]

5.1.2. Planning Subarea [if any]

5.2. California Department of Water Resources

DWR operates and maintains the State Water Project, including the California Aqueduct. The Department also provides dam safety and flood control services, assists local water districts in water management and conservation activities, promotes recreational opportunities, and plans for future statewide water needs.

5.3. U.S. Bureau of Reclamation

The mission of the Bureau of Reclamation is to manage, develop, and protect water and related resources in an environmentally and economically sound manner. Originally conceived under the Reclamation Act of 1902 as a means to help settle the West by providing infrastructure for agricultural development, the Reclamation program focused on the construction of dams and facilities to store and convey water. As the potential for additional project purposes was identified by the states and local entities, Congress

DRAFT

July 11, 2006

supplemented the Reclamation Act to add hydropower production, flood control, municipal and industrial water, recreation, and fish and wildlife enhancement to the list of authorized project purposes.

5.4. Metropolitan Water District of Southern California

MWD is a special water district organized and existing under California Water Code Appendix, Chapter 109. MWD acquires and develops water for delivery to 26 public agencies who in turn deliver water directly to homes and businesses, or to other water agencies who ultimately deliver the water to retail customers. The water acquired and developed by MWD, which includes water from the State Water Project, serves nearly 17 million people in portions of six southern California counties (Ventura, Los Angeles, Orange, San Bernardino, Riverside, and San Diego).

5.5. Kern County Water Agency

KCWA is a special water district organized and existing under California Water Code Appendix, Chapter 99. KCWA is a contractor for water from the State Water Project. The State Water Project water is diverted to 14 member units and is used to irrigate, in whole or in part, more than 500,000 acres of prime farmland and to serve municipal water throughout Kern County, including the City of Bakersfield.

5.6. Santa Clara Valley Water District

SCVWD is a special district organized and existing under California Water Code Appendix, Chapter 60. SCVWD's water supply includes water developed by both the Central Valley Project and the State Water Project. SCVWD's water supply serves approximately 1.6 million people in homes and businesses located throughout Santa Clara County, including the vital high technology industry in the area known as "Silicon Valley." SCVWD is a member agency of the SLDMWA.

5.7. Zone 7 Water Agency

Zone 7 Water Agency is one of the 10 active zones of the Alameda County Flood Control and Water Conservation District. Zone 7 receives up to 75% of its water from the State Water Project. Along with flood protection, Zone 7 manages the local ground water basins and is the wholesale water supplier to all of eastern Alameda County and a population of more than 190,000. Treated water is sold to local retailers, including the cities of Livermore and Pleasanton, the Dublin San Ramon Services District, and the California Water Service Company. Zone 7 also distributes untreated water to local agriculture operations and golf courses.

5.8. San Luis and Delta Mendota Water Authority

The SLDMWA is a joint powers authority formed pursuant to California Government Code section 6500 *et seq.* The SLDMWA consists of 32 member public agencies that contract with Reclamation for water supply from

DRAFT

July 11, 2006

the CVP for distribution and use within areas of San Joaquin, Stanislaus, Merced, Fresno, Kings, San Benito, and Santa Clara Counties, California.

5.9. Westlands Water District

WWD, a member of the SLDMWA, is a California water district formed pursuant to California Water Code section 34000 *et seq.* WWD holds contractual rights to receive water from Reclamation, through the Central Valley Project, for distribution and consumption within the areas of Fresno and Kings counties. WWD provides water for municipal and industrial uses, and for the irrigation of approximately 500,000 acres on the west side of the San Joaquin Valley in Fresno and Kings Counties. WWD's farmers produce more than 60 high quality commercial food and fiber crops sold for the fresh, dry, canned and frozen food markets, both domestic and export. More than 50,000 people live and work in the communities, dependant on WWD's agricultural economy

5.10. Mirant Delta

Mirant Corporation owns and operates two natural-gas fired power generation plants on the Delta, one in Pittsburg and one in an unincorporated area of Contra Costa County east of Antioch. Both plants use water from the adjacent Sacramento River for power generation operations.

5.11. California Resources Agency [NEED TO DISCUSS THE RESOURCE AGENCY'S ROLE AND WHETHER IT IS APPROPRIATE FOR IT TO BE ASSIGNED A FORMAL ROLE IN THE PLANNING AGREEMENT EVEN IF IT IS NOT A PARTY TO THE AGREEMENT.]

5.12. California Department of Fish and Game

DFG is the agency of the State of California authorized to act as trustee for the state's wildlife. DFG administers and enforces CESA, the NCCPA and other provisions of the Fish and Game Code. DFG is authorized to enter into agreements with federal and local governments and other entities for the conservation of species and habitats, to authorize incidental take under CESA and the NCCPA, and to provide regulatory assurances.

5.13. National Marine Fisheries Service

NMFS is an agency of the United States Department of Commerce authorized by Congress to administer and enforce FESA with respect to marine mammals and certain fish species (including anadromous fish), to enter into agreements with states, local governments, and other entities to conserve federally threatened, endangered, and other species of concern, to authorize incidental take under FESA, and to provide regulatory assurances in accordance with 50 C.F.R. section 222.307(g).

5.14. United States Fish and Wildlife Service

DRAFT

July 11, 2006

The USFWS is an agency of the United States Department of the Interior authorized by Congress to administer and enforce FESA with respect to terrestrial wildlife, certain fish species, insects and plants, to enter into agreements with states, local governments, and other entities to conserve threatened, endangered, and other species of concern, to authorize incidental take under FESA, and to provide regulatory assurances in accordance with 50 C.F.R. section 17.22(b)(5) and section 17.32(b)(5).

6. Preliminary Conservation Objectives

The preliminary conservation objectives the Parties intend to achieve through the BDCP are to:

- Provide for the protection of Covered Species and associated natural communities and ecosystems that occur within the Planning Area;
- Preserve the diversity of fish, plant and animal communities within the Planning Area;
- Minimize and mitigate, as appropriate, the take of proposed Covered Species;
- Preserve and restore habitat and contribute to the recovery of Covered Species;
- Reduce the need to list additional species;
- Set forth species specific goals and objectives;
- Set forth specific habitat-based goals and objectives; and
- Implement an adaptive management and monitoring program to respond to changing ecological conditions.

6.1 Conservation Elements

6.1.1 Ecosystems, Natural Communities, and Covered Species List

The BDCP will employ a strategy that focuses on the conservation of ecosystems, natural communities, and ecological processes in the Planning Area. In addition, the BDCP will employ species-specific minimization, mitigation, conservation and management measures where appropriate.

The BDCP will focus primarily on aquatic ecosystems and natural communities. The BDCP may also address adjacent riparian or upland ecosystems and natural communities, as appropriate, to more fully evaluate the impacts of Covered Activities and to provide for the conservation of Covered Species.

Species that are intended to be the initial focus of the BDCP include federally and state listed, and candidate aquatic species such as Central California Coast steelhead, Central Valley steelhead, Central Valley Chinook salmon (spring run and fall/late-fall runs), Sacramento River Chinook salmon (winter run), Central California Coho salmon, Southern Oregon/Northern California Coho salmon, Delta smelt, green sturgeon, and tidewater goby. This list

DRAFT

July 11, 2006

identifies the species that [] will evaluate for inclusion in the BDCP as proposed Covered Species and is not necessarily the BDCP's final Covered Species list. Issuance of State and federal take authorizations for any particular Covered Species will require an individual determination by the applicable Fishery Agency that the BDCP meets applicable State and/or federal permit issuance requirements.

6.1.2 Conservation Areas and Viable Habitat Linkages

The BDCP will protect, enhance, or restore aquatic and associated upland habitat throughout the Planning Area and provide or enhance habitat linkages, where appropriate within the Planning Area. The Plan will also identify where linkages between important habitat areas inside and outside the Planning Area should occur. The BDCP conservation strategy will address a range of environmental gradients and ecological functions, and will address appropriate principles of ecosystem management, ecosystem restoration, and population biology.

6.1.3 Project Design

The BDCP will ensure that each Covered Activity is appropriately designed to avoid and/or minimize and mitigate direct and indirect impacts to Covered Species and their habitats.

7. Preparing the BDCP

The Parties intend that this Planning Agreement will establish a mutually agreeable process for preparing the BDCP that meets the requirements of the NCCPA, CESA and FESA. The process used to develop the BDCP will incorporate independent scientific input and analysis and include extensive public participation with ample opportunity for comment from the general public and from key groups of stakeholders, as described below.

7.1. Best Available Scientific Information

The BDCP will be based on the best available scientific information, including, but not limited to:

- principles of conservation biology, community ecology, aquatic ecology, individual species' ecology, and other appropriate scientific data and information;
- thorough information about all natural communities and proposed Covered Species within the Planning Area; and
- advice from well-qualified, independent scientists.

7.2. Data Collection

The Parties agree that the BDCP will be based on the best available scientific information, and that the Parties will collaborate to ensure that such information is obtained through a range of credible sources, including experts not affiliated the Fishery Agencies. Data collection efforts for preparation of the BDCP will be coordinated with existing efforts, including

DRAFT

July 11, 2006

the CALFED Science Program. Preference should be given to collecting data essential to address the needs of natural communities and proposed Covered Species for purposes of developing conservation measures and strategies for the BDCP. The science advisory process and analysis of existing information may reveal data gaps currently not known that are necessary for the full and accurate development of the BDCP. Data needed for preparation of the BDCP may not be known at this time nor identified herein. Therefore, the Parties anticipate that data collection priorities may be adjusted from time to time during the planning process. All data collected for the preparation and implementation of the BDCP will be made available to the Fishery Agencies in hard and digital formats, as requested.

7.2.1 Types of Data

Data will be gathered to establish baseline conditions, evaluate impacts of Covered Activities on Covered Species, and develop conservation strategies and measures for Covered Species. Data needed to accomplish these tasks may include, but not be limited to: species life histories, species occurrence, population abundance and distribution, population trends, population genetics, habitat locations and conditions, hydrologic regime, hydrodynamics, salinity, temperature, flow patterns, water quality, barrier and hazard types and locations, habitat connectivity, ecological threats and stressors, and riverine processes.

7.3. Independent Scientific Input

The Parties intend to include independent scientific input and analysis to assist in the preparation of the BDCP. For that purpose, independent scientists representing a broad range of disciplines, including conservation biology and locally-relevant ecological knowledge, will, at a minimum:

- recommend scientifically sound conservation strategies for species and natural communities proposed to be covered by the BDCP;
- recommend a range of conservation actions that would address the needs of species, ecosystems, and ecological processes in the Planning Area proposed to be addressed by the BDCP;
- recommend management principles and conservation goals that can be used in developing a framework for the monitoring and adaptive management component of the BDCP; and
- identify data gaps and uncertainties so that risk factors can be evaluated.

The independent scientists may be asked to provide additional feedback on key issues during preparation of the BDCP, and may prepare reports regarding specific scientific issues throughout the process, as deemed necessary by the Parties.

[] will coordinate with the CALFED Science Program on the design and implementation of the science advisory process, and will ask the

DRAFT

July 11, 2006

existing Independent Science Panel to recommend potential science advisors. [] will establish funding and payment procedures. The independent science advisory process will include the development of a detailed scope of work, use of a professional facilitator, input from technical experts, and production of a report by the scientists. In addition, [] will make the report available for use by all Parties and the public during the planning process.

7.4. Public Participation

[] will oversee the preparation of the BDCP and will ensure an open and transparent process with an emphasis on obtaining input from a balanced variety of public and private interests. The planning process will provide for thorough public review and comment.

7.4.1. Steering Committee and Interested Observers

To assist in the development of the Plan, the Parties have formed a Steering Committee. The Steering Committee consists of representatives from the Fishery Agencies, other participating State and federal agencies, water agencies, power interests, and non-governmental organizations. Describe structure, responsibilities, and functioning of committee.] Staff from [] will work with the Steering Committee to provide technical expertise and share information for the development and implementation of the BDCP.

The Parties have also established a group of “Interested Observers,” representing other stakeholder interests. Interested Observers will be provided notice of Steering Committee meetings and invited to attend.

7.4.2. Outreach

[] will provide access to information for persons interested in the BDCP. The Parties expect and intend that public outreach regarding preparation of the BDCP will be conducted largely by and through the Steering Committee meetings. In addition, [] will hold public meetings to present key decisions regarding the preparation of the BDCP to allow the public the opportunity to comment on and inquire about the decisions. The Parties may use Bay Delta Public Advisory Committee or its successor as a venue for public meetings. Other outreach efforts will include [insert methods, e.g., development of a quarterly newsletter, a BDCP website, and other informational mass mailings].

7.4.3. Availability of Public Review Drafts

_____ will designate and make available for public review in a reasonable and timely manner “public review drafts” of pertinent planning documents including, but not limited to, plans, memoranda of understanding, maps, conservation guidelines, and species coverage lists. Such documents will be made available by _____ at least ten

DRAFT

July 11, 2006

working days prior to any public hearing addressing these documents. In addition, _____ will make available all reports and formal memoranda prepared by the Steering Committee. This obligation will not apply to all documents drafted during preparation of the BDCP. However, _____ will periodically designate various pertinent documents drafted during preparation of the BDCP as “public review drafts”, and will make these documents available to the public. The Parties agree the internet [insert web address] will be one of the principal means of making documents available for public review, as well as more traditional means such as distribution and display of hard copies of such documents.

7.4.4. Public Hearings

Public hearings regarding development of the BDCP will be planned and conducted in a manner that satisfies the requirements of CEQA, NEPA, and any other applicable State or federal laws.

7.4.5. Public Review and Comment Period Prior to Adoption

_____ will make the proposed draft BDCP and Implementing Agreement available for public review and comment a minimum of 60 days before adoption. The draft BDCP and Implementing Agreement will be distributed with the draft environmental impact report prepared for the BDCP pursuant to CEQA and/or the draft environmental impact statement prepared for the BDCP pursuant to NEPA.

7.5. Covered Activities

Covered Activities under the BDCP will be activities carried out by the Potential Regulated Entities that may result in take of Covered Species within the Planning Area. Covered Activities will be identified and addressed in the BDCP. Covered Activities may include, but are not necessarily limited to, existing or new activities related to:

- *Storage elements of the SWP and CVP*
- *Conveyance elements of the SWP and CVP*
- *Operational activities, including power generation and emergency preparedness, of the SWP and CVP*
- *Water transfers to Water Contractors or to serve environmental programs*
- *Maintenance of the SWP, CVP, and other applicant facilities*
- *Facility improvements of the SWP and CVP*
- *Ongoing operation of, and recurrent and future projects related to Other Delta Water Users*
- *Adaptive habitat management, enhancement, and monitoring activities*

The Parties intend that the BDCP will allow Covered Activities in the Planning Area to be carried out in compliance with FESA and applicable provisions of the Fish and Game Code.

DRAFT

July 11, 2006

7.6. Interim Project Processing

The Parties recognize that before the Fisheries Agencies approve the BDCP, certain projects and activities associated with Potential Regulated Entities may be proposed within the Planning Area. The Parties agree to the following interim project process to: (1) ensure that new major discretionary projects approved or initiated in the Planning Area before completion of the Plan are consistent with the preliminary conservation objectives (section 6) and do not compromise successful completion and implementation of the Plan; (2) facilitate CEQA, CESA, and FESA compliance for interim projects that require it; and (3) ensure that processing of interim projects is not unduly delayed during preparation of the Plan.

7.6.1. Reportable Interim Projects

The Parties acknowledge and agree that certain interim projects and activities will not require review pursuant to the interim project process set forth in this section. Specifically, the Parties have previously indicated their support for the implementation of interim projects and activities that have been identified in the Memorandum of Agreement, executed [DATE], subject to the completion of any required environmental review and regulatory compliance [See MOA Attachments B (water supply projects), C (water quality projects), D (ecosystem projects), E (levees and other work in the waterways), and F (project schedules)]. The Parties also agree that projects and activities that were anticipated and considered in the CALFED NCCP, and subject to the Action Specific Implementation Plan process, will not require Fishery Agency review under the interim project process. The Parties further agree that the development of the BDCP shall not delay the implementation of any of these interim projects. Other projects or activities within the Planning Area that require discretionary approvals from [], and that have the potential to conflict with the preliminary conservation objectives, will be considered Reportable Interim Projects and subject to the interim project process.

7.6.2. Notification Process

The Party proposing to undertake or approve a Reportable Interim Project will notify the Fishery Agencies of the project prior to the time, or as soon as possible after, the project application is deemed complete. The Party will notify the particular individuals designated by the Fishery Agencies to be notified of Reportable Interim Projects, and will provide these designated individuals with (1) a depiction of the project location on a USGS 7.5 minute quadrangle map with the quadrangle name and section, township, and range identified; (2) a description of the project along with the land cover types present on the project site using the most current land cover data available to the Party; and (3) any other biological information available to the Party about the project area.

DRAFT

July 11, 2006

7.6.3. Fishery Agency Review

The Fishery Agencies will review Reportable Interim Projects in a timely manner, and will use reasonable efforts to provide any comments on the projects to the referring Party within the legally prescribed comment periods. The Fishery Agencies will recommend mitigation measures or project alternatives that would help achieve the preliminary conservation objectives and will not preclude important conservation planning options or connectivity between areas of high habitat values. Any take of listed or candidate species arising out of a Reportable Interim Project must be authorized pursuant to applicable federal and/or state law. In providing any such authorizations, the Fishery Agencies shall not impose mitigation measures or project alternatives that result in regulatory obligations that exceed the requirements of applicable State and federal wildlife protection laws.

7.6.4. Coordinating Interim Process with BDCP Preparation

The Parties will meet as needed to discuss Reportable Interim Projects and to coordinate with development of the BDCP. Independent scientific input will be considered by the Parties during interim project review.

7.7. Protection of Habitat and Other Resources During Planning Process

7.7.1. Conservation Actions

The Parties may elect to preserve, enhance or restore, either by acquisition or other means, aquatic and upland resources in the Planning Area that support native species of fish, wildlife or natural communities prior to approval of the BDCP. The Parties will confer with the Fishery Agencies regarding potential resources to be protected. The Fishery Agencies agree to credit such resources toward the land and water acquisition or habitat protection, enhancement, and restoration requirements of the BDCP as appropriate, provided these resources are appropriately conserved, restored or enhanced, and managed and contribute to the BDCP's conservation strategy.

7.7.2. Mitigation

Actions to protect, enhance, or restore habitat that are undertaken solely to mitigate the impacts of specific projects, actions, or activities approved prior to BDCP approval will only be considered as mitigation for those projects, actions or activities. Such measures will be considered during the BDCP analysis, but will not count toward future mitigation obligations of the BDCP.

7.8. Implementing Agreement

While the BDCP is being developed, the [Who? Define term] will negotiate a draft Implementing Agreement that includes specific provisions and procedures for the implementation, monitoring and funding of the BDCP. A

DRAFT

July 11, 2006

draft of the Implementing Agreement will be made available for public review and comment with the final public review draft of the BDCP. The Implementing Agreement will contain provisions for:

- conditions of species coverage;
- the long-term protection of habitat reserves and/or other conservation measures;
- implementation of mitigation and conservation measures;
- terms for suspension or revocation of the take permit;
- procedures for amendment of the BDCP and Implementing Agreement;
- implementation of monitoring and adaptive management;
- oversight of BDCP effectiveness and funding; and
- periodic reporting.

8. Commitment of Resources

8.1. Funding

The Parties agree that they will work together to bring available funding to the planning effort.

8.1.1. Funding of Fishery Agencies' Costs

For calendar years 2006 and 2007, Reclamation and DWR on behalf of the State Water Project shall contribute an aggregate of \$3 million annually for the collective use of DFG, USFWS, and NMFS staff and for administrative costs related to the development of the BDCP. Reclamation and DWR may be reimbursed in whole or in part in the event that Other Delta Water Users and Other Parties contribute to the development of the BDCP.

8.1.2. DFG and DWR Assistance with Funding

DFG and DWR agree to cooperate with the other Parties in identifying and securing, where appropriate, federal and State funds that may be used to support the development and implementation of the BDCP. DFG and DWR's commitments and obligations under this Planning Agreement are subject to the availability of appropriated funds and the written commitment of funds by an authorized DFG or DWR representative. [Note: State Agencies to seek section 6 and other BDCP Participant funding]

8.1.3. USFWS, NMFS, and Reclamation Assistance with Funding

The USFWS, NMFS, and Reclamation agree to cooperate with the other Parties in identifying and securing, where appropriate, federal and State funds earmarked for habitat conservation planning purposes. Potential federal funding sources may include: the USFWS' Cooperative Endangered Species Conservation Fund, Land and Water Conservation Fund, and land acquisition grants or loans through other federal agencies such as the Environmental Protection Agency, the Army Corps of Engineers, or the Departments of Agriculture or Transportation. The commitments of the

DRAFT

July 11, 2006

USFWS, NMFS and Reclamation under this Planning Agreement are subject to the requirements of the federal Anti-Deficiency Act (31 U.S.C. section 1341) and the availability of appropriated funds. The Parties acknowledge that this Planning Agreement does not require any federal agency to expend its appropriated funds unless and until an authorized officer of that agency provides for such expenditures in writing. [Note: federal agencies to seek other BDCP Participant funding]

8.2. Expertise of Fishery Agencies

Subject to funding and staffing constraints, the Fishery Agencies agree to provide technical and scientific information, analyses and advice to assist the [] with the timely and efficient development of the BDCP.

9. Miscellaneous Provisions

9.1. Public Officials Not to Benefit

No member of or delegate to Congress will be entitled to any share or part of this Planning Agreement, or to any benefit that may arise from it.

9.2. Statutory Authority

The Parties will not construe this Planning Agreement to require any Party to act beyond, or in a manner inconsistent with, its statutory authority or to make applicable to the Central Valley Project ("CVP") any State law that, in the absence of this Planning Agreement, would not apply to the CVP.

9.3. Multiple Originals

This Planning Agreement may be executed by the Parties in multiple originals, each of which will be deemed to be an official original copy.

9.4. Effective Date

The Effective Date of this Planning Agreement will be the date on which it is fully executed by the Parties.

9.5. Duration

This Planning Agreement will be in effect until the BDCP is approved and permitted by the Fishery Agencies, but shall not be in effect for more than five years following the Effective Date, unless extended by amendment. This Planning Agreement may be terminated pursuant to Section 9.7 below.

9.6. Amendments

This Planning Agreement can be amended only by written agreement of all Parties.

9.7. Termination and Withdrawal

Subject to the requirement in Section 9.7.1 of the Planning Agreement, any Party may withdraw from this Planning Agreement upon 30 days' written

DRAFT

July 11, 2006

notice to the other Parties. The Planning Agreement will remain in effect as to all non-withdrawing Parties unless the remaining Parties determine that the withdrawal requires termination of the Planning Agreement. This Planning Agreement can be terminated only by written agreement of all non-withdrawing Parties.

9.7.1. Funding

In the event that federal or State funds have been provided to assist with BDCP preparation or implementation, any Party withdrawing from this Planning Agreement shall return to the granting agency unspent funds awarded to that Party prior to withdrawal. A withdrawing Party shall also provide the remaining Parties with a complete accounting of the use of any federal or State funds it received regardless of whether unspent funds remain at the time of withdrawal. In the event of termination of this Planning Agreement, all Parties who received funds shall return any unspent funds to the grantor prior to termination.

9.8. No Precedence

Participation in this Planning Agreement by DWR, Reclamation, or a Water Contractor is not an assurance that any of said Parties will participate in current or later phases of the BDCP or related agreements or actions. Any of said Parties may withdraw from this Planning Agreement. In addition, participation in this Planning Agreement shall not be deemed acquiescence to the development of an NCCP. The [Who?] shall decide whether to seek approval of the BDCP under the NCCPA and/or to apply for a section 2081 permit at or before the time that the BDCP is finalized.

SIGNATURES:

Dated: _____, 20__

[insert party name]

By: _____

Title: _____

Dated: _____, 20__

CALIFORNIA DEPARTMENT OF FISH
AND GAME

By: _____

Dated: _____, 20__

US FISH AND WILDLIFE SERVICE

DRAFT

July 11, 2006

By: _____
[insert name and title]

Dated: _____, 20__

NATIONAL MARINE FISHERIES
SERVICE
[insert as appropriate]

By: _____
[insert name and title]

[ADD ALL PARTIES TO THIS AGREEMENT]